STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2013
v	No. 310786 Hillsdale Circuit Court
TERESA ANNE MCCOY, Defendant-Appellant.	LC Nos. 11-352562-FH; 11-352573-FH; 11-352574-FH

Before: WHITBECK, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant Theresa Ann McCoy was convicted by a jury of three counts of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), and three counts of conspiracy to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); MCL 750.157a. Defendant was sentenced as a subsequent offender under the controlled substances act, MCL 333.7413(2)(A), to concurrent sentences of 46 to 480 months' imprisonment for each delivery conviction and 23 to 240 months' imprisonment for each conspiracy conviction. Defendant was credited with 215 days of time served. She appeals as of right. We affirm.

The incidents that led to defendant's convictions occurred on March 9, 14, and 17, 2011. On each of these dates, a confidential informant (CI) working with the Michigan State Police "OMNI-3" Narcotics Unit, arranged to purchase heroin from defendant over the telephone. The CI then met with a friend of defendant's to purchase the heroin using prerecorded Michigan State Police buy funds, and later gave the heroin to a Michigan State Police trooper. A member of the "OMNI-3" Narcotics Unit listened in on at least two of these telephone calls and recognized defendant's voice. He also observed that the telephone number from which the calls were placed belonged to defendant. Other members of the "OMNI-3" Narcotics Unit observed the purchases. The vehicle in which defendant was riding was stopped after the March 17 incident and $100 of the prerecorded Michigan State Police money used to purchase the heroin was found in the wallet of defendant's then boyfriend.

Defendant was also charged with and acquitted of another count of delivery of less than 50 grams of heroin with regard to a May 11, 2011 incident. On that date, a different CI arranged to purchase heroin from defendant in the presence of an "OMNI-3" Narcotics Unit member, met

with a friend of defendant's at a local gas station and purchased the heroin, and then gave the heroin to a Michigan State Police trooper.

Before trial, defendant moved to sever the May incident from the three March incidents. The trial court, citing MCR 6.120 and *People v Williams*, 483 Mich 226; 769 NW2d 605 (2009), stated,

> "The plain language," according to the Supreme Court, "of MCR 6.120 permits joinder if the offenses are related. Offenses are related if they comprise either the same conduct or a series of connected acts or acts constituting part of a single scheme or plan."
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> The court in that case, *Williams*, concluded "The offenses charged in both cases reflect defendant's single scheme or plan of drug trafficking. Consequently, defendant had no right to sever these related offenses. The trial court noted that in light of the relevant facts, a single jury trial was appropriate and, further, the court stated that it would be cautioning the jury that they need to find that both events have to meet the standard of proof beyond a reasonable doubt."
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> In this case it would appear the allegations are that she was engaged in the act of [sic] trade of heroin delivery. Accordingly, based on the case that I cited, as well as the court rule, the Court will deny the requested relief. These will be tried together.

The trial court effectuated its ruling in an order entered on September 20, 2011.

During the trial, it became apparent that the CI used in the three March incidents was not going to appear. The prosecutor informed the trial court that a subpoena, which stated that the CI was personally served, had actually been served on his mother, and that no other action had been taken to locate the CI before the trial began. The trial court found that the prosecutor had failed to exercise due diligence in producing the CI. However, defense counsel did not ask for a missing witness instruction, CJI2d 5.12, and the trial court did not give one. When the trial court asked if there were any objections to the jury instructions as given, defendant's counsel stated, "I have none, your Honor."

On appeal, defendant first argues that the CI who failed to appear was a "likely" endorsed res gestae witness, and that when a prosecutor fails to produce an endorsed witness, a missing witness instruction, CJI2d 5.12, is appropriate. This instruction provides that the jury may infer that the missing witness's testimony "would have been unfavorable to the prosecution's case." CJI2d 5.12. However, we find that this issue was waived by defendant's failure to request the jury instruction and his acquiescence to the jury instructions given at trial. Defense counsel explicitly stated that he did not have any objections to the jury instructions, which constitutes a waiver. *People v Kowalski*, 489 Mich 488, 503-504; 803 NW2d 200 (2011). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* at 503 (quotation marks and citation omitted). Therefore, with regard to this issue, there is no error to review. *Id.*

Defendant next argues that if we find that the issue with regard to the missing witness jury instruction is waived, we should find that her counsel acted ineffectively by failing to request a missing witness instruction. Our review is "limited to mistakes apparent from the record" because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request an evidentiary hearing as required by *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *Id.*

To prevail on an ineffective assistance of counsel claim, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show that defense counsel's performance was deficient, "a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "As for prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303 (quotation marks and citation omitted)

Defendant cannot demonstrate that her counsel's performance in failing to request a missing witness instruction fell below an objective standard of reasonableness because, even assuming that defendant was entitled to such an instruction, defendant cannot show that it was contrary to sound trial strategy for defense counsel to remain silent with regard to this issue. Because of the testimony offered by the CI at the preliminary examination, defense counsel was aware that the CI's testimony would not be favorable to defendant. If defendant had objected to the CI's absence or requested a missing witness instruction, the trial court may have ordered that further efforts be made to locate the CI, which would have been contrary to defendant's interests. Therefore, defendant has not overcome the strong presumption that it was reasonable trial strategy for defense counsel to avoid any course of action that would have increased the likelihood that the CI would be made to appear. More importantly, defendant cannot demonstrate that, but for counsel's failure to request a missing witness instruction, the result of the trial would have been different. There was overwhelming evidence of guilt, including the testimony of two witnesses who delivered heroin for defendant.

Next, defendant argues that her due-process and compulsory-process rights were violated when the prosecutor failed to produce the CI who was involved in the three March incidents because he was a res gestae witness. However, defendant gives cursory treatment to this claim and does not cite to any case law to support the argument that the failure to produce a res gestae witness, without more, is a violation of due process or the compulsory process. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Accordingly, defendant has not shown error.

Finally, defendant argues that the trial court erred in denying her motion to sever the trials. To the extent defendant argues that each March incident should have been tried

separately, this issue is waived because defendant agreed at the motion hearing that the three March incidents were related. See *Kowalski*, 489 Mich at 503-504.

With regard to the severance of the three March incidents from the May incident, "[t]o determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review." *Williams*, 483 Mich at 231.

MCR 6.120(B) states in pertinent part that:

> On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
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> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
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> (b) a series of connected acts, or
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> (c) a series of acts constituting parts of a single scheme or plan.

This court rule was considered extensively in *Williams*, 483 Mich at 228-244. The Court held that the two charges at issue were "related" under MCR 6.120:

> In both cases, defendant was engaged in a scheme to break down cocaine and package it for distribution. Evidence of acts constituting part of defendant's single scheme was found in both the motel room and the house at 510 Nevada. Even if one views defendant's first arrest in November and his second arrest in February as discrete moments in time, direct evidence indicated that he was engaging in the same particular conduct on those dates. The charges stemming from both arrests were not "related" simply because they were "of the same or similar character." Instead, the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution. Accordingly, the trial court complied with what the language of MCR 6.120 unambiguously required. [*Williams*, 483 Mich at 234-235.]

Here, like in *Williams*, the evidence indicates that defendant was engaged in a single scheme or plan to sell narcotics. The March incidents and the alleged May incident were related because during both defendant (1) used text messages to set up the sale, (2) sent other individuals to make the delivery at a preplanned location, (3) was engaged in the sale and packaging of heroin. This evidence supports the conclusion that defendant was engaged in a single scheme or

plan—the trafficking of heroin—throughout each of the incidents. MCR 6.120; *Williams*, 483 Mich at 233-235. Accordingly, the trial court did not err in denying defendant's motion to sever the trials.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly